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No. 03-674

In the

Supreme Court of the United States

Keyse G. Jama,
Petitioner,

v.

Immigration and Naturalization Service,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF YUSUF ALI ALI, MOHAMED AWEYS, MOHAMED HUSSEIN HUNDIYE, GAMA KALIF MOHAMUD, AND THE CLASS OF INDIVIDUALS THAT THEY REPRESENT AS AMICI CURIAE IN SUPPORT OF PETITIONER

Thomas L. Boeder
Counsel of Record
Nicholas P. Gellert
Rolf B. Johnson

PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

Yusuf Ali Ali, Mohamed Aweys, Mohamed Hussein Hundiye, and Gama Kalif Mohamud were each ordered removed to Somalia on various dates in 2000 and 2001. However, because there was "no significant likelihood of [their] removal [to Somalia] in the reasonably foreseeable future," *Zadvydas v. Davis*, 533 U.S. 678, 681 (2001), they were released from detention pursuant to orders of supervision. Somalia "has been without a central government" and in "a state of general chaos" since 1991, *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash.), *aff'd*, 346 F.3d 873 (9th Cir. 2003). Although no material change occurred in Somalia, and thus Somalia remained unable to accept them, in late 2002, each was told that their removal to Somalia was imminent.

On the eve of their planned departure for Somalia, Messrs. Ali, Aweys, Hundiye, and Mohamud filed a joint habeas petition with the District Court for the Western District of Washington, seeking to prevent their removal to Somalia unless and until Somalia accepted them. The district court granted an emergency stay of removal.

Counsel for these individuals then began hearing reports of other individuals at risk of imminent removal to Somalia. When efforts to obtain information concerning the identities and locations of these individuals failed, the habeas petition was amended to seek class action relief on behalf of all individuals subject to final orders of removal to Somalia. The district court granted an emergency stay of removal for all prospective class members.

Following a hearing, the district court granted the habeas petition on behalf of Messrs. Ali, Aweys, Hundiye, Mohamud, and the class of individuals for which it determined they were proper and adequate class representatives. The district court *sua sponte* excluded from the class the petitioner in the case before the Court—Keyse

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[1] No counsel for a party authored this brief in whole or in part. No person, entity, or organization other than Amici Curiae and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent for the filing of this brief have been filed with the Clerk of the Court.

Jama—and the several other individuals who had already filed individual habeas petitions challenging the Government's ability to remove them to Somalia without Somalia's acceptance. The district court enjoined the removal of all members of the class to Somalia until Somalia accepts them, *Ali*, 213 F.R.D. at 396, and the Ninth Circuit affirmed, *Ali v. Ashcroft*, 346 F.3d 873, 877 (9th Cir. 2003). The Government's petition for rehearing *en banc*, filed in December 2003, is pending at the Ninth Circuit.

INTRODUCTION

One of the central themes that the Government presented in opposition to the Petition in this case is that the Eighth Circuit "correctly concluded that 'there exist[ed] no settled judicial construction' of former Section 1253(a) that required acceptance of the alien by the foreign government in all circumstances." Br. for Resp. in Opp. at 11 (quoting Pet. App. 7a). In fact, the judiciary, the executive branch, and the legislative branch uniformly have viewed acceptance as required.

This brief will set out in detail the history of the acceptance requirement, before proceeding to discuss recent proceedings relating to the Government's efforts to remove aliens to Somalia in the face of this history. This brief will then conclude with a short argument section in which it explains some of the ways in which the Eighth Circuit's reasoning is flawed and should be rejected by the Court.

STATEMENT OF THE CASE

A. THE HISTORY OF THE ACCEPTANCE REQUIREMENT

1. The Immigration Act of 1917

For most of the first half of the 20th century, the countries to which aliens could be removed was controlled by § 20 of the Immigration Act of 1917, ch. 29, 39 Stat. 874 (the "1917 Act"). This provision stated:

> That the deportion of aliens provided for in this Act, shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

Under the 1917 Act, the Government was thus limited to three possibilities for deporting an alien. Depending on the circumstances, it could send the alien back to the country from which he or she came to the United States or of which he or she was (1) a subject or citizen or (2) a resident prior to coming to the United States.

Section 20 of the 1917 Act only addresses the issue of acceptance expressly for the situation where an alien arrived in the United States from a country of which the alien was not a subject or citizen. Nevertheless, it was widely understood that acceptance from the country to which an alien was to be removed was required in all instances. In *United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023 (2d Cir. 1938), for example, the court held:

> It will be presumed in every case of deportation that the United States immigration authorities have obtained the consent of the native sovereignty to receive the deported alien.

Executive branch officials came to the same conclusion. For instance, in a 1949 letter to the Judiciary Committee, Attorney General Tom C. Clark observed that "many aliens . . . cannot be returned to the country of their nationality because of a passport refusal by their own government." *Deportation and Detention of Aliens: Hearings on H.R. 10 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 4 (1949). *See also id.* at 6

(INS Commissioner, Watson B. Miller, discussing the fact that many aliens could not be deported because of the refusal of foreign governments to accept them).

2. The Internal Security Act of 1950

In the aftermath of World War II, Congress evaluated potential amendments to the immigration laws to deal with various national security issues, with a particular emphasis on potential Communist subversives. Congress enacted the Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (the "1950 Act"), to deal with many of these issues. For instance, this legislation made present or former membership in the Communist Party a ground for inadmissibility. 1950 Act, § 22.

The 1950 Act also gave the Attorney General additional authority with respect to the countries to which aliens could be removed. Section 20 of the 1917 Act was amended to read as follows:

> That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or

> impossible, then to any country which is willing to accept such alien into its territory. . . .

1950 Act, § 23. For the first time, the Attorney General was authorized to select among the allowable countries of removal, without any order of priority, if the country selected by the alien for deportation did not accept the alien. Moreover, the 1950 Act expanded the list of countries to which an alien could be deported. In addition to returning the alien to the country from which he or she had come, was a subject or citizen, or was a resident, the 1950 Act authorized the Attorney General to deport an alien elsewhere, including to his country of birth or, ultimately, to any country that would agree to accept him or her.

The legislative history of § 23 of the 1950 Act confirms that Congress expected the Attorney General to obtain acceptance from the country where an alien is to be removed. Indeed, the history shows there was considerable concern with the problems associated with the need to get acceptance, yet the solutions considered did not include eliminating the requirement.[2]

First, the history confirms the widely held understanding that acceptance was required from the receiving country. This is reflected, *inter alia*, by the considerable concern and frustration about the effect of the rule. For instance:

- In criticizing the Hobbs Bill for providing overzealous surveillance of deportable aliens and confinement without judicial trial, Congressman Arthur Klein nonetheless recognized its attempt to deal with the growing problem of undeportables: "more than 1,300 undesirable and deportable aliens are running about loose in the United States. The immigration laws say that they must be deported, and the countries to which they might be deported say they will not take these

---

[2] The text of § 23 of the 1950 Act was derived from a bill introduced by Congressman Sam Hobbs, and referred to as either the "Hobbs Bill" or "H.R. 10." Thus, much of the legislative history discussed in this brief is in the context of the Hobbs Bill. The history includes reports of the committees charged with examining immigration policy issues, as well as the statements of individual legislators during floor debates.

undesirable people." 97 CONG. REC. A5229 (1950).

- Similarly, Congressman Williams Bolton remarked, "I understand that there are outstanding nearly 3,000 orders for deportation of these people and by refusal of their native country to take them back or by their own refusal to obtain necessary travel documents, they are today enjoying the freedom of the United States." 97 CONG. REC. A5270 (1950).
- The Senate Committee on the Judiciary explained that "[o]ne of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of aliens found deportable by the Service but who cannot be deported." *Report of the Comm. of the Judiciary,* S. Res. 137, 81st Cong., 2d Sess. 637 (1950) (80th Cong., 1st Sess., as amended).
- Senator Patrick McCarran noted during the presentation of the Senate version of the Hobbs Bill, "Under the present laws, there are literally thousands of cases of aliens who have been found to be deportable but who cannot be deported because of certain technicalities in the law. . . . [U]nder the present law the Government of the United States is powerless to execute its orders of deportation, and the aliens are free to roam the country at will." 97 CONG. REC. 14173 (1950).
- Congressman Klein read into the floor record a *Washington Post* editorial critiquing the passage of the Hobbs Bill which described the United States as being "'at the mercy of communistic agents'" whose regimes refuse to take them back once they enter the United States. 97 CONG. REC. A5231 (1950).

Throughout this legislative history, however, there is no mention of eliminating the acceptance requirement. Rather, the issue of so-called "undeportables" was dealt with by increasing the number of countries from which acceptance could be sought and by giving the Attorney General

additional powers to help obtain acceptance. For instance, the Attorney General was given the ability to apply pressure on other countries to provide acceptance, through reciprocal action against countries that did not grant acceptance. 1950 Act, § 22(7). The Attorney General also was given increased authority to detain aliens pending removal. 1950 Act, § 23. And an alien subject to an order of deportation could be convicted of a felony if he "shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." *Id.*

With respect to reciprocity, Senator McCarran explained, "This provision would enable the Attorney General to curtail immigration from those countries that refuse to accept back deportable aliens who were admitted to the United States upon the basis of documents issued by such countries." 97 CONG. REC. 14180 (1950).

With respect to detention, the Hobbs Bill was criticized for granting unfettered authority to the Attorney General to supervise and detain aliens pending their deportation. Central to the constitutional challenges to this measure was that the detention would be indefinite and not tied to the charging of a particular crime. The Hobbs Bill's promoters countered that the object of the detention was not to indefinitely keep the aliens in the United States or punish them, but rather to speed up their deportation by influencing the alien or the country from which he or she came to cooperate with the deportation process.

- In support of the Hobbs Bill, Senator Harry Cain explained that "[a]s the situation stands today, the Communist world can keep its agents in this country at will, because they know we will permit them to roam around and engage in their activities without restraint. I am convinced however, that should we serve notice that deportable subversives will be confined if their countries of origin will not accept them, the Communist world will be happy to take them back." 97 CONG. REC. 7220 (1950).
- In discussing Harry Bridges, a recognized member of the Communist Party living in the United States, Representative Hobbs noted that Bridges, along with 1,000 other aliens, had

come to the United States in "one of three easy ways—able seaman's enlistment, jumping ship in our ports, and getting travel documents which means coming through the United States." He went on to state that these aliens could easily find their way out by these means as well. In support of his bill he explained: "I am not interested in keeping [Bridges] locked up. I want him to get out. If his own country says he is such a bad citizen that they will not have him back, then I do not know of a better atmosphere to cool his fevered brow until he gets the inclination to ship again as an able seaman. That is the way he came in. He can go back that way, anywhere he wants to, and jump ship without any fear of being bothered." 97 CONG. REC. 10675-676 (1950).

- An attorney for the Jewish War Veterans of the United States testified as to his belief that deporting aliens to any country possible, regardless of where the alien was born or whether he was a resident or national of the country, could not lawfully be implemented because "[o]ur government cannot under law deport any alien to any country unless that 'country is willing to authorize the reception of such alien." Representative Michael Feighan then interrupted him to make clear that "it is contemplated that only countries who would be willing to receive such aliens would receive them" under the bill. *Deportation and Detention of Aliens: Hearings on H.R. 10 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 6 (1949).

3. The Court's Decision in *United States v. Spector*

During its October 1951 Term, the Court considered a challenge to the portion of the 1950 Act that made it a felony for an alien subject to an order of removal to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." *United States v. Spector*, 343 U.S. 169, 170 (1952) (quotation marks, citation and emphasis omitted). The district court had dismissed criminal charges against Spector on the basis that the statute "was unconstitutionally vague and indefinite, because it did not specify the nature of the travel documents necessary for departure nor indicate to which country or to how many countries the alien should make application." *Id.* at 171. The Court reversed the district court, concluding that the statute was clear "when viewed in its statutory setting." *Id.* The Court's analysis discussed the necessity of getting the receiving country's acceptance:

> The statutory scheme seems clear and unambiguous. The choice of a country willing to receive the alien is left first to the alien himself and then to the Attorney General. ***Once the country willing to receive the alien is identified***, the mechanism for effecting his departure remains.

Id. (emphasis added).

Justice Jackson, in dissent, discussed the purpose behind criminalizing the failure to cooperate in obtaining travel documents:

> Experience in the Executive Department with the immigration laws made me aware of a serious weakness in the deportation program which Congress by this Act was trying to overcome. ***A deportation policy can be successful only to the extent that some other state is willing to receive those we expel***. But, except selected individuals who can do us more harm abroad than here, what Communist power will cooperate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped off to some other part of the world.

> While we would not join in a strained construction of the Constitution to create captious or trivial obstacles or delays to solution of this problem, we cannot sanction sending aliens to prison except upon compliance with constitutional procedures. We can afford no liberties with liberty itself.

Id. at 179-80 (Jackson, J., dissenting) (emphasis added).

4. The Immigration and Nationality Act of 1952

Through the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the "INA"), Congress sought to bring all of the country's immigration and naturalization laws under one comprehensive statute. S. Rep. No. 82-1137 at 1-2 (1952). In the process, § 20(a) of the 1917 Act as amended by the 1950 Act was incorporated into the INA at § 243(a). The language was modified to read as follows:

> The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be

> directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—
>
> (1) to the country from which such alien last entered the United States;
>
> (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
>
> (3) to the country in which he was born;
>
> (4) to the country in which the place of his birth is situated at the time he is ordered deported;
>
> (5) to any country in which he resided prior to entering the country from which he entered the United States;
>
> (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
>
> (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

INA, § 243(a).

5. Judicial and Administrative Interpretations of Section 243(a) of the INA

(a) Federal Court Decisions

Soon after passage of the INA, the federal courts faced a series of cases evaluating the Attorney General's authority under § 243(a). In each of these cases, the courts concluded that the statute required acceptance in all circumstances.

In 1953, the District Court for the Southern District of New York was presented with a habeas petition by an alien who contended that

> the Attorney General has had a reasonable time following entry of the final order—almost five months—to effect his deportation, and since it now affirmatively appears that it is well nigh impossible to deport him to any country within the six-month period referred to in § 242(c), or in a considerably longer period, there is no basis for his continued detention as an incident of deportation.

United States ex rel. Kusman v. Dist. Dir. of Immigration & Naturalization at Port of N.Y., 117 F. Supp. 541, 543 (S.D.N.Y. 1953). The court concluded that the six-month detention period was a maximum, and that it did not mean an alien could not seek release from detention earlier when there was a showing that removal would not occur before six months passed. *Id.* at 545. As a result, the court needed to determine if the habeas petitioner had met his burden of proving that his removal was not likely to occur soon. In this context, the court observed that the removal statute, in all instances, requires acceptance from the receiving country:

> It is necessary to consider the statutory scheme designed to expedite the deportation of aliens. The alien is given the privilege to designate the country to which he desires deportation. He is limited to a single choice. If the designated country is unwilling to accept him, the Attorney General is directed to deport him first to the country of which he is a "subject, national or citizen," or failing that, to send him to a series of specified countries, including that (a) from

> which he last entered into or embarked for the United States, (b) of his birth, (c) in which is now contained the place of his birth. ***But if none of the designated places will have him***, or deportation there is "impracticable, inadvisable or impossible", then the Attorney General is empowered to deport to any country—except one contiguous to the United States—which will accept him.

Id. at 545-56 (emphasis added). *See also United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F. Supp. 468 (S.D.N.Y. 1956); *United States ex rel. Tom Man v. Shaughnessy*, 142 F. Supp. 444 (S.D.N.Y. 1956), *aff'd*, 264 F.2d 926 (2d Cir. 1959).

In 1954, the Second Circuit addressed several of the provisions of the third step of § 243(a), including that relating to place of birth, in the context of mainland China. *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954). In *Moon*, Judge John Harlan observed that deportation could only occur to China as the place of the aliens' birth, "of course, [if it] turns out that the Chinese communist authorities are willing to accept this alien." *Id.* at 319.

In 1959, the Second Circuit addressed the Attorney General's removal authority even more directly in *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959). In *Tom Man*, Judge Learned Hand definitively concluded:

> There remains therefore one or more of the seven subdivisions of § 243(a) [previously codified at 8 U.S.C. § 1253(a)] of which number three [the country in which he was born] certainly covers him and probably several others. ***However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into its territory."***

Id. at 928 (emphasis added). "We cannot see any reason to suppose that the necessary consent in such situations should not follow the pattern laid down earlier in the section . . . ." *Id. See also Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960).

Over the next few years, the Ninth Circuit and the D.C. Circuit followed the lead of the Second Circuit. *See Chi Sheng Liu v. Holton*, 297 F.2d 740, 743-44 (9th Cir. 1961) (following the Second Circuit decision in *Tom Man*); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 183 (D.C. Cir. 1963) ("[W]here the aliens were not acceptable to or accepted by the [Chinese] Nationalist Government under the second 'priority' of the statute, deportation could be made only to a country willing to accept them, after inquiry, under the third part of the statute.").

The First Circuit expressed its agreement two decades later in *Amanullah & Wahidullah v. Cobb*, 862 F.2d 362 (1st Cir. 1988), *vacated*, 872 F.2d 11 (1st Cir. 1989). In *Cobb*, each member of the three-judge panel wrote an opinion, because they could not agree whether 8 U.S.C. § 1227(a)(2), the "parallel provision" for excludable aliens, required "prior inquiry to and assurance from a country that it is willing to accept the excludable alien before that alien may be deported to that country." *Id.* at 365.[3] In their individual opinions, however, all three members of the panel agreed that § 243(a) required acceptance prior to removal of a deportable alien. *See id.* at 365, 368, 370-71.

(b) Board of Immigration Appeals Decisions

In the meantime, the Board of Immigration Appeals (the "Board") also addressed the need for acceptance from the country to which an alien was to be removed. In 1968, in the case of an alien ordered removed to the country of which she was a national or citizen as well as where she was born, the Board concluded that "obviously, the United States cannot deport an alien to a country which will not accept her." *Matter of Anunciacion*, No. A-14438768, 12 I. & N. Dec. 815, 817, 1968 WL 14118 (BIA July 25, 1968). The Board stated this conclusion in the context of holding that acceptance of the country to which an alien is ordered removed need not be determined when removal is ordered to

[3] Senior Judge Pettine believed acceptance was required, *id.* at 365 n.4; Judge Aldrich believed it was not, *id.* at 369-70; and Judge Coffin declined to decide the issue, but nonetheless observed "that it is sheer folly to send an alien to another country without any indication that the country will not receive the alien," *id.* at 368.

that country, but instead is to be determined "after the order of deportation has become final." *Id.*

Likewise, in *Matter of Linnas*, No. A-8085626, 19 I. & N. Dec. 302, 307, 1985 WL 56051 (BIA Oct. 16, 1985), the Board, citing both the statute and *Tom Man*, stated that step three of the country of removal process requires the acceptance of the receiving government in *all* situations: "the 'government' . . . under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'"[4]

The Government argues that the Board's decision in *Matter of Niesel*, No. A-12281979, 10 I. & N. Dec. 57, 1962 WL 12904 (BIA Aug. 10, 1962), is contrary to *Linnas*. However, *Niesel* did not raise the issue whether acceptance by the country of removal was required in the ***execution*** of a deportation order or whether removal could occur without properly issued travel documents. Rather, in that case, the alien argued that the INS must obtain the agreement of the country of removal before deportation can be ***ordered*** to that country.

> Counsel contends, moreover, that under judicial construction of the Act, ***before deportation to a country can be ordered***, the Service must make a showing that the proposed country has agreed to accept the alien. *Lu v. Rogers*, 164 F. Supp. 320 (D.D.C. 1958), is cited. When ***designating*** a country in step three as a place of deportation, there is no requirement that ***preliminary inquiry*** be addressed to the country to which deportation is ***ordered*** . . . .

10 I. & N. Dec. at 59 (emphasis added).[5]

[4] The Government has argued that *Linnas* does not express a nationwide view, but was compelled by the Second Circuit result in *Tom Man*. However, as discussed in the previous section of this brief, at the time *Linnas* was decided (indeed, until the Eighth Circuit's decision in the present case), every court, including the several circuits, that had evaluated the question had reached the same result. Moreover, the Board did not state in *Linnas* that it disagreed with *Tom Man* but felt it was compelled to follow the Second Circuit's decision.

[5] In neither *Anunciacion* nor *Linnas* did the Board even suggest its prior decision in *Niesel* was contrary to the result in those cases.

6. The Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (the "IIRIRA"). Through the IIRIRA, § 243(a) was recodified at 8 U.S.C. § 1231(b)(2). The statute remains substantively identical, but now reads:

> **(2) Other aliens.** Subject to paragraph (3) –
>
> (A) **Selection of country by alien**. Except as otherwise provided in this paragraph –
>
> (i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and
>
> (ii) the Attorney General shall remove the alien to the country the alien so designates.
>
> * * *
>
> (C) **Disregarding designation.** The Attorney General may disregard a designation under subparagraph (A)(i) if –
>
> (i) the alien fails to designate a country promptly;
>
> (ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;
>
> (iii) the government of the country is not willing to accept the alien into the country; or
>
> (iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

> (D) **Alternative country**. If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country –
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
>
> (ii) is not willing to accept the alien into the country.
>
> (E) **Additional removal countries**. If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> (i) The country from which the alien was admitted to the United States;
>
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States;
>
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States;
>
> (iv) The country in which the alien was born;
>
> (v) The country that had sovereignty over the alien's birthplace when the alien was born;

(vi) The country in which the alien's birthplace is located when the alien is ordered removed;

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2).

Congressional committee reports related to the IIRIRA confirm that the modifications to the wording between § 243(a) of the INA and 8 U.S.C. § 1231(b)(2) were not intended to be substantive. In particular, a major report on immigration issues by the Judiciary Committee of the House of Representatives stated as follows with respect to § 1231(b)(2), "Section 241(b) establishes the countries to which an alien may be removed. . . . [S]ubsection (b)(2) ***restates*** the provisions in current sections 243 (a) and (b) [8 U.S.C. § 1253(a)]." H.R. Rep. No. 104-469, at 234 (1996) (emphasis added). *See also* H.R. Rep. No. 104-828, at 216 (1996) (repeating that the intent was simply to "restate" the prior provisions).

7. INS Regulations and Operations Instructions

Regulations governing the detention, removal, and release process state that the designated country of removal must accept the alien to effectuate removal. *See* 8 C.F.R. § 241.4(k)(1) (INS officials shall review the custody of certain aliens "where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien"); 8 C.F.R. § 241.13(d)(1) (an alien may show there is no likelihood of removal in the foreseeable future to the designated country and "no third country willing to accept the alien"); 8 C.F.R. § 241.13(f) (Headquarters Post-Order Detention Unit shall consider factors including "the receiving country's willingness to accept the alien into its territory" in determining whether there is a likelihood of the alien being removed in the foreseeable future); 8 C.F.R. § 241.5(c) (governing

conditions of release after the removal period and stating that an officer may "grant employment authorization to an alien released under an order of supervision if the officer specifically finds that [t]he alien cannot be removed because no country will accept the alien").

Similarly, regulations governing detention of aliens beyond the removal period show that travel documents are an essential part of removing an alien. Under 8 C.F.R. § 241.4(g)(3), INS officials "***shall*** consider the ability to obtain a travel document for the alien" in making a custody determination. (Emphasis added.) INS officials must continue to pursue travel documents both during the removal period and after the removal period expires. 8 C.F.R. § 241.4(g)(2). Similarly, INS Operations Instruction 243.1(c)(1) makes clear that "deportation cannot be effected until travel documentation has been obtained."

Finally, it is important to note that the Government issued every one of the foregoing regulations and operations instructions ***after*** the enactment of the IIRIRA in 1996. That is, prior to and even after (as explained below) its recent efforts to remove individuals to Somalia, the Government itself has consistently interpreted 8 U.S.C. § 1231(b)(2) to require the receiving country's acceptance prior to removal.

B. THE EXECUTIVE'S RECENT EFFORTS TO DEPORT ALIENS WITHOUT ACCEPTANCE

In 2000 and 2001, the Government ordered amici Yusuf Ali Ali, Mohamed Aweys, Mohamed Hussein Hundiye, and Gama Kalif Mohamud deported to Somalia. Because there was "no significant likelihood of [their] removal [to Somalia] in the reasonably foreseeable future," *Zadvydas*, 533 U.S. at 681, they were released from detention pursuant to orders of supervision.[6]

Following the terrorist attacks of September 11, 2001, the Government stepped up efforts to deport aliens from countries suspected of having terrorist connections. As part of this effort, the Government began organizing to remove groups of aliens to Somalia by privately chartered aircraft.

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[6] Mr. Mohamud was later re-detained in June 2002 for alleged violations of his conditions of release.

See Excerpts of Record filed with Ninth Circuit in *Ali v. Ashcroft*, Ninth Circuit No. 03-35096 (hereinafter "*Ali* ER"), F3; Supplemental Excerpts of Record filed with Ninth Circuit in *Ali v. Ashcroft*, Ninth Circuit No. 03-35096 (hereinafter "*Ali* SER"), 175-79. *See also Ali*, 213 F.R.D. at 396 (discussing Government's shift in deportation policy after September 11, 2001).[7] The first (and the last) such charter-flight removal occurred in February 2002 and resulted in the removal of 24 Somalis to a "transiting" country from which they were supposed to be removed by the charter company to Somalia. *Ali* ER Tab F3.

Two weeks prior to this chartered flight, Magistrate Judge Boylan ruled that the planned removal of Keyse Jama to Somalia violated § 1231(b)(2) because the Government had not, and could not, obtain the consent of Somalia. *See* Pet. App. 34a-38a. District Court Judge Tunheim affirmed this result on March 31, 2002. Pet. App. 55a.

Notwithstanding the absence of a recognized Somali government and the Minnesota District Court's determination that, under this circumstance, § 1231(b)(2) bars removal to Somalia, the Government continued its efforts to remove aliens to Somalia. In the fall of 2002, it began organizing another private charter flight for the removal of more individuals to Somalia. Five aliens in the Seattle, Washington area—Messrs. Ali, Aweys, Hundiye, and Mohamud, as well as Ahmad Noor Yusuf—were selected to be part of this removal operation.

On Friday, November 8, 2002, Messrs. Ali, Aweys, Hundiye, and Yusuf were served with letters revoking their orders of supervision and notifying them that plans were underway for their "imminent" removal to Somalia. *Ali* ER Tab D. With the exception of Mr. Mohamud, these

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[7] Somalia has been, since 1991, "a country in chaos, engaged in clan warfare with rival groups clashing over turf and control, with no government and no diplomatic relations with the United States." *Ali*, 213 F.R.D. at 400. Although the Government has asserted that Somalia is linked with terrorism, the Government has presented no evidence of international terrorist activities in Somalia, *see id.* at 401, nor has the Government even alleged that Jama or amici are suspected terrorists. In any event, there is a separate statute for removal of suspected terrorists, which also requires acceptance of the receiving country. 8 U.S.C. § 1537(b)(2).

individuals had been free from detention under orders of supervision, but they were re-detained at this time.

Working under enormous time pressures and assisted by Mr. Jama's counsel, counsel in Seattle succeeded in gathering together and drafting the pleadings necessary to file a consolidated petition for habeas corpus with the United States District Court for the Western District of Washington on Wednesday, November 13, 2002, the day before these five individuals were to be flown out. Given the immediacy of the situation, counsel simultaneously filed on their clients' behalf an emergency motion for a temporary restraining order, and that same day, the Western Washington District Court enjoined the Government from removing the petitioners and set a briefing schedule to determine whether a preliminary injunction should issue. *See Ali*, 213 F.R.D. at 397.

Over the next week and a half, Seattle counsel learned that, despite the orders issued by the Minnesota District Court and the Western Washington District Court, the Government was continuing its attempts to remove a number of other individuals to Somalia. Seattle counsel and others scrambled, often with only hours to spare, to locate detained Somalis around the country (who often had been moved from one state to another) and then identify *pro bono* counsel that might be able to assist them. In late November and early December 2002, as a result of these efforts, the United States District Courts for the Eastern and Western Districts of Louisiana issued orders restraining the Government from removing to Somalia over a dozen other individuals. *See Ali*, 213 F.R.D. at 397.

The efforts of the various *pro bono* counsel around the country were complicated by the fact that Somalis were often being detained and then moved from state to state without notice to their families or anyone else outside the Government. In an effort to identify and locate persons at risk of removal to Somalia, on November 18, 2002, Seattle counsel submitted an expedited request to the Government under the Freedom of Information Act, 5 U.S.C. § 552. *Ali* SER 33-35. The Government did not provide the requested information. *See Ali* SER 23-24.

Faced with these circumstances, on November 26, 2002, petitioners amended their habeas petition to seek class relief.[8] *Ali*, 213 F.R.D. at 397. Counsel simultaneously requested that the Government halt all deportations to Somalia until a decision on the merits of the class action petition could be rendered. *Ali* SER 50-51. The Government did not respond to this request and, accordingly, on December 4, 2002, with a further removal of a group of individuals to Somalia by charter aircraft scheduled for early December 2002, counsel filed an emergency motion for a class-wide temporary restraining order against removals to Somalia. In a telephonic hearing on December 5, 2002, the district court judge requested that the Government refrain from conducting such removals until a decision on the merits of the class action habeas petition had been issued, but the Government refused. The district court, therefore, issued an oral decision temporarily enjoining all removals to Somalia, which was followed by a written order to the same effect on December 9, 2002. *Ali*, 213 F.R.D. at 397.

Oral argument on the motions for a preliminary injunction and for class certification was heard on January 14, 2003, and both motions were granted from the bench. *Id.* The district court, on its own initiative, excluded from the class all individuals who had, as of that date, already filed a habeas corpus petition raising the acceptance requirement issue, thereby not interfering with other pending matters or thwarting percolation of the issue at the lower courts. The district court issued a written opinion on January 17, 2003, making the preliminary injunction permanent and concluding, *inter alia*, that "[t]he class action vehicle is necessary to open the doors of the courthouse for a large number of Somalis ***whose identity and location the Government refuses to reveal***." *Id.* at 411 (emphasis added).

The Government appealed the decision to the Ninth Circuit. The Ninth Circuit agreed to the Government's unopposed request to consider the appeal on an expedited basis. The Ninth Circuit affirmed on September 17, 2003. *Ali*, 346 F.3d at 892. The Government filed a petition for

[8] At the same time, Mr. Yusuf was dropped from the habeas petition as the agency determined that he had a meritorious claim on a different issue. *See Ali* SER 50-51.

rehearing *en banc* on December 11, 2003, which petition currently is pending.

One of the Government's principal arguments before the district court was that "because there is no government to ***reject*** persons removed to the territory of Somalia, 'acceptance' has occurred. Put another way, Petitioners would be deemed 'accepted' unless they are 'barred from deplaning in Somalia or otherwise expelled from Somalia.'" *Ali*, 213 F.R.D. at 401 (quoting Government's Return and Response at 24). Before the Ninth Circuit, however, the Government abandoned this argument. Instead, it relied on its assertion that the "plain language" of § 1231(b)(2) permits the Government to remove an alien to Somalia without acceptance if Somalia is that person's country of birth. *Ali*, 346 F.3d at 881.

C. MEMORANDUM OF THE OFFICE OF LEGAL COUNSEL

Ironically, less than two weeks after the Government filed its notice of appeal to the Ninth Circuit and one week after oral argument to the Eighth Circuit in Mr. Jama's case, the Office of Legal Counsel (the "OLC") issued a memorandum that interprets § 1231(b)(2). Contrary to the Government's present "plain language" argument, the memorandum states that "***if none*** of the six listed countries [in 8 U.S.C. § 1231(b)(2)(E)(i)-(vi)] ***is willing to accept*** the alien," then the Attorney General must seek another country "whose government is willing to accept the alien." Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service at 13 n. 11 (Feb. 20, 2003) (emphasis added), *available at* <http:www.usdoj.gov/olc/INSDetention.htm>.

The Government made no mention of the memorandum in its briefing to the Ninth Circuit, and Seattle counsel did not become aware of it until December 2003, when they discovered it on the Department of Justice website. Upon discovering the memorandum, Seattle counsel sent a letter to the Solicitor General requesting that the Government either cease efforts to conduct removals to Somalia or at least explain how the Government's litigation position can be reconciled with the OLC's views. The Government did not

provide a direct response to this inquiry. Instead, the response came in a footnote in the Government's brief in opposition to the Petition in this case. *See* Br. for Resp. in Opp. at 12 n. 5.

The Government first dismissed the memorandum on the basis that § 1231(b)(2) "was not the subject of OLC's advice." *Id.* However, the OLC used its interpretation of § 1231(b)(2) to justify its other opinions in the memorandum. The Government also attempted to distance itself from the memorandum by arguing that it did "not consider the situation in this case, where the country of removal lacks a functioning government and acceptance therefore would be a practical impossibility." *Id.* However, the Government recently has asserted that its interpretation of § 1231(b)(2) allows a removal to Ethiopia, a country with a recognized central government, after Ethiopia failed to accept the alien. *See Abdulrahman v. Arrendale*, No. H-03-3849, Petition for Writ of Habeas Corpus (S.D. Tex., Sept. 10, 2003) *available at* <http://pacer.txs. uscourts.gov/> (recounting how the United States flew Abdulrahman to Ethiopia after the district court denied a prior habeas corpus petition (No. H-02-0743), despite Ethiopia's refusal to accept Abdulrahman, and returned Abdulrahman to detention in the United States when Ethiopia refused his entry).

SUMMARY OF ARGUMENT

The Government's position is contrary to an extensive history of legislative, judicial and administrative precedent. Its position also is contrary to the view set forth in the INS's own regulations and operations instructions, as well as the view expressed by the OLC.

Despite the fact that the current provision is virtually identical to the provision in place since the 1950s, the Government would have the Court ignore this history by suggesting that it was erased when Congress changed some of the statute's formatting in order to "restate" it under the IIRIRA in 1996. H.R. Rep. No. 104-469, at 234 (1996). *See* Br. for Resp. in Opp. at 12; *see also Ali*, 213 F.R.D at 403. The Government argues that the Eighth Circuit "correctly concluded that 'there exist[ed] no settled judicial construction' of former Section 1253(a) that required acceptance of the alien by the foreign government in all circumstances." Br. for Resp. in Opp. at 11 (quoting Pet.

App. 7a). This is simply incorrect. As demonstrated above, not only the courts, but the Board, the agency, and Congress uniformly understood that acceptance is a prerequisite to any removal.

Where the alien is a citizen or national of his country of birth, the Government's interpretation of the statute would allow the alien to be removed to that country pursuant to the third step in the statute when the same country previously refused to accept the alien pursuant to the second step of the statute. Where the alien is not a citizen or national of his country of birth, in the Government's view, the statute forces it to seek acceptance only of the country with a greater connection to the alien (country of citizenship) rather than the country with a more attenuated connection to the alien (country of birth). This turns the logic of the statute on its head. If the acceptance requirement were to be eliminated with respect to any countries, which it should not, it could only make sense to do so with respect to those countries with the greatest connection to the alien, not those with the least connection.

The Eighth Circuit struggled to explain away these absurd results, but its efforts do not withstand scrutiny.

ARGUMENT

Every court to examine the question until the Eighth Circuit decision below has concluded that the Attorney General may not remove an alien to a country that has not accepted the alien. The Board reached the same conclusion, as did the INS in passing regulations and adopting operations instructions.

Congress has acted in the face of this unanimous body of law to reaffirm, not alter, the status quo. Congress did not solve the issue of "undeportables" by eliminating the need for acceptance, but instead by expanding the number of places from which the Attorney General could seek acceptance, and giving the Attorney General other tools, including detention and the power to penalize countries not willing to accept aliens.

In the face of this long history, the Government has presented a variety of arguments. None has merit. One of the Government's initial principal arguments—that Somalia has granted acceptance when the United States finds a way to

deplane aliens within Somalia—has been abandoned. *See Ali*, 213 F.R.D. at 401. The fact that the Government made that argument at all suggests its lack of confidence in the position it continues to pursue, that acceptance is not required.

The Government also has posited that the statute must be interpreted not to require acceptance in the unique circumstances of Somalia, where there is no government from which acceptance can be sought. This argument fails for a variety of reasons. First, the Government has shown that it does not in fact recognize such a distinction by applying its no-acceptance-required position to a country that *does* have a government recognized by the United States, namely, Ethiopia. *See Abdulrahman v. Arrendale*, No. H-03-3849, Petition for Writ of Habeas Corpus (S.D. Tex., Sept. 10, 2003), *available at* <http://pacer.txs.uscourts.gov/>. Second, there is no language in the statute suggesting it should be interpreted differently for countries without recognized governments.[9] Third, the situation in Somalia is indistinguishable from that of the People's Republic of China at the time of *Tom Man*. Congress was aware that there were countries with governments that the United States did not recognize when it enacted the statute. Yet, Congress did not say anything about treating such situations differently when removing aliens.

The statute sets forth a logical progression from the country of greatest connection to the alien to the country of least connection to the alien. The Government's position ignores this progression. In doing so, the Government's view creates the potential for absurd results. It, therefore, must be rejected. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative

[9] If an argument were to be made that places without recognized governments are to be treated differently, it would have to be that such places do not even constitute "countries" as that term is used in the statute. *See, e.g., Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) (a "country" to which an alien may be deported is "any place possessing a government with authority to accept an alien deported from the United States"); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (suggesting that a "country" for removal purposes requires a functioning government with control of the historical geographic region). *See also* Pet. App. 11a-12a (Bye, J., dissenting).

interpretations consistent with the legislative purpose are available."). In particular, the Government's position allows for the removal of an alien to the country of his birth without acceptance under the third step of the statute when that same removal could not occur under the first or second steps of the statute. It, likewise, allows for the removal of an alien to a country with little connection to the alien to occur without acceptance, when, if anything, removal without acceptance makes more sense for a country with a greater connection to the alien.

The Eighth Circuit majority offered two reasons for avoiding this major flaw in the Government's position. Neither of these rationales withstands scrutiny.

First, to avoid the absurdity of Congress requiring the Attorney General to seek acceptance from the country of citizenship, but not requiring the Attorney General to seek acceptance from the country of birth, the Eighth Circuit points to the possibility that a person may not be "a subject, national or citizen of the country in which he was born." Pet. App. 7a. Although some aliens are subjects, nationals or citizens of a country other than where they were born, it is far more common that they are subjects, nationals or citizens of their country of birth. As a result, the Government's interpretation would allow it to avoid the acceptance requirement in the earlier step of the statute in the vast majority of situations. The potential for such abuse supports the conclusion that the statute requires acceptance under all steps of the process.[10] Moreover, the Eighth Circuit's proffered rationale ignores the argument that acceptance from the country of birth should be required under this scenario because the alien has virtually no connection to the country other than happening to have been born there. As stated above, if anything, one would expect acceptance to be more important the lesser the connection between the alien and the country.

The Eighth Circuit's second rationale—that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act

[10] At a minimum, if this rationale allows the statute to be interpreted to allow removal to the country of birth without acceptance, it can only be for situations where the alien is not a citizen, national or resident of the country of birth.

anyway if the request is refused" (Pet. App. 7a)—is even weaker. The country of nationality or citizenship is not an option in the third step of the statute. This omission is fatal to the Eighth Circuit's reasoning. If Congress truly intended to have the Attorney General ask first and then act regardless of the answer, Congress would have allowed the Attorney General to send the alien to the country of citizenship, regardless of where born, in the third step if acceptance was refused in the second step. Likewise, if Congress was willing to have the Attorney General simply ask first and then act anyway, it could have simply said so. Put simply, there is no support for the proposition that Congress authorized the Attorney General to proceed in the unorthodox manner suggested by the Eighth Circuit.

CONCLUSION

For all the reasons stated above and the more expansive arguments set forth in the Petitioner's merits brief, amici urge the Court to reverse the judgment of the Eighth Circuit and confirm that acceptance is a prerequisite to any removal.

RESPECTFULLY
SUBMITTED

Thomas L. Boeder
Counsel of Record
Nicholas P. Gellert
Rolf B. Johnson
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Amici Curiae